Office-Supreme Court, U.S.
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85-30

No. _____

IN THE SUPREME COURT
OF THE
UNITED STATES

ROBERT F. TIERNEY,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Does Federal Rule of Evidence 402 allow the admission of evidence of an unrelated indictment of a criminal defendant when evidence of such indictment will not aid the jury in finding the existence of any material fact more or less likely.

2. May a court rely on evidence excluded from admission in determining whether other evidence sought to be admitted is relevant.

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OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit, United States v. Tierney, 760 F.2d 382 (1st Cir. 1985). (App. A). The judgment was entered on May 3, 1985.

JURISDICTION

The jurisdiction of this Court is claimed under 28 U.S.C. §1254.

FEDERAL RULES INVOLVED

Federal Rule of Evidence 402

All relevant evidence is admissible, except as otherwise provided by the

Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Federal Rule of Evidence 404(b)

(b) Other crimes, wrongs or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity of absence or mistake or accident.

STATEMENT OF THE CASE

On February 15, 1984, a federal grand jury returned an indictment against the petitioner, Robert F. Tierney, alleging eighteen counts of violation of 18 U.S.C. § 1341. The indictment alleged that the petitioner had been an employee of the City of Boston School Department, had held

the position of Supervisor of Attendance and was a member of the State-Boston Retirement System. The indictment also alleged that on or about November 26, 1975, the petitioner reported being in an automobile accident in Boston, Massachusetts, that on October 15, 1980 the petitioner resigned from the Boston School Department, that on October 16, 1980 the petitioner was indicted by a federal grand jury, that on or about September 2, 1981 the petitioner filed for an accidental disability retirement pension, claiming a total and permanent incapacitation from performing his duties as a Supervisor of Attendance which resulted from injuries allegedly suffered in the 1975 accident and that a disability retirement was awarded to him on January 26, 1982. The alleged scheme to defraud was that the September, 1981 claim for accidental disability retirement benefits was false

and fraudulent and included false and fraudulent representations to the doctors who examined the petitioner on behalf of the Boston Retirement Board and to the Boston Retirement Board that he was unable to perform his duties as a Supervisor of Attendance, that the inability was a result of injuries suffered in the 1975 accident and concerning the extent and duration of the medical treatment received by him for said injuries. The specific eighteen counts correspond to eighteen disability pension checks received by the petitioner.

The petitioner was tried in front of a jury on May 15, 17, 18, 22, and 23, 1984. A verdict of guilty on all eighteen counts was returned on May 24, 1984.

The petitioner appealed to the United States Court of Appeals for the First Circuit which on May 3, 1985 affirmed the convictions below.

During the trial the government asked

the court to take judicial notice that the petitioner had been indicted on October 16, 1980 for violations of 18 U.S.C. §§1951 and 1952, been tried, convicted and served a sentence. The petitioner moved to strike all references to the same. The court upheld the striking of all references to the conviction, sentence and investigations surrounding the October 16, 1980 indictment but allowed evidence as to the indictment itself to be presented to the jury.

STATEMENT OF FACTS

Petitioner, Robert F. Tierney, was employed by the City of Boston in several capacities from May 10, 1950 to October 15, 1980. From September, 1965 he was employed by the Boston School Department as a Supervisor of Attendance (also known as a truant officer). On November 25, 1975, while in the course of his work, the car being driven by the petitioner was

struck from the rear by another car. The petitioner was out of work on total disability from November 25, 1975 to May, 1976. On October 15, 1980, the petitioner resigned from his position with the School Department. On that date the petitioner requested an application for retirement benefits. On October 16, 1980, the petitioner was indicted by a federal grand jury for violations of 18 U.S.C. §§ 1951 and 1952. On July 28, 1981, the petitioner filed an application for retirement for accidental disablity. The petitioner was examined by a three-doctor panel, with one doctor designated by the petitioner, one doctor designated by the Retirement Board and one designated by the state. All three doctors stated that the petitioner was permanently disabled, he was unable to perform all the duties as a school truant offficer and the disability was such as might be the natural and proximate result of an accident or hazard

undergone on account of which retirement is claimed. On January 26, 1982 the Boston Retirement Board voted to grant said benefits. The petitioner received eighteen checks from the City under these benefits.

During the trial, the government argued that when the petitioner resigned from the Boston School Department he was not totally and permanently disabled from perfoming his duties as a Supervisor of Attendance. The government also argued that any disability that the petitioner might have had was not related to the automobile accident. Finally, the government argued that the petitioner made false and fraudulent representations to the panel of doctors and to the Boston Retirement Board.

REASONS FOR GRANTING WRIT

In the instant case, the courts below have misinterpreted Federal Rule of

Evidence 402 in such a manner as to allow clearly inadmissible, irrelevant evidence to be presented to a jury. There was no showing whatsoever of the relevance of the evidence in question. Therefore this petition does not involve the review of the exercise of discretion of a trial judge but a clear error as to the meaning of relevance under the Federal Rules of Evidence. This evidence was, also, clearly prejudicial and prevented the petitioner from obtaining a fair trial.

The opinion of the Court of Appeals also indicates that the Court upheld the right of the District Court to find evidence relevant based on excluded evidence. This is also a misinterpretation of the meaning of relevance under the Federal Rules of Evidence.

ARGUMENT

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE PERTAINING TO THE OCTOBER 16,

1980 INDICTMENT OF THE PETITIONER, MISINTERPRETED THE MEANING OF RELEVANCE UNDER FEDERAL RULE OF EVIDENCE 402 AND RELIED ON EXCLUDED EVIDENCE FOR A FINDING OF RELEVANCE.

Federal Rule of Evidence 402 states in part that "§[e]vidence which is not relevant is not admissible." The definition of relevance under this Rule is the logical connection between the evidence sought to be introduced and the issue to be proved. Stated another way, the question to be asked is "(d)oes the evidence offered render the desired inference more probable than it would be without the evidence?" C. McCormick, Handbook of the Law of Evidence, § 185 (2nd. ed., 1972). In the instant case the government successfully sought to introduce evidence that one day after the petitioner had resigned from the Boston School Departmen he had been indicted by a

federal grand jury for a crime other than the one for which he was on trial. This information appeared in the instant indictment, in the tape of the Boston Retirement Board hearing and was referred to in the government's closing argument. As the government also requested, the Court took judicial notice and instructed the jury that the allegations contained in that indictment were sufficient to render applicable Massachusetts General Law, Chapter 268, Section 25. That statute, which also went to the jury as an exhibit, provides that a state or city employee under indictment for misconduct in office or employment may be suspended and that during that suspension is not be entitled to any pension or retirement benefits.

The government's argument in introducing the evidence of the indictment and in requesting judicial notice of the applicability of the statute is that on October 15, 1980 the petitioner resigned

from his position from the Boston School Department not because his back pain had increased to the point where he could no longer work but because he would lose all retirement benefits if he were indicted for misconduct in office. The major and irreparable flaw in this argument is that the 1980 indictment was returned after the petitioner resigned. Not one bit of evidence presented during the trial permits any inference that the petitioner had any knowledge of the forthcoming 1980 indictment at the time he resigned. In fact, the jury was given evidence that it was a secret indictment and that on October 15, 1980 the petitioner had no knowledge that he was going to be indicted. The Court of Appeals states that "the force of the government's point relates not to Tierney's advance knowledge of the 1980 Indictment per se, but to whether or not he had reason to know that

an indictment was likely lurking in the wings". App. A p. 20. However, neither the Court or the government can point to any evidence admitted in the trial that indicate the petitioner had reason to suspect that this indictment was likely. The only evidence admitted concerning any persons knowledge of the indictment or its likelihood was that it was a secret indictment. In the absence of any evidence that the petitioner knew of or suspect the forthcoming indictment, the government and the Court try to rely upon the "chronometry of the surrounding events", App. A. p. 25, essentially stating that because the 1980 indictment was handed down a day after the petitoner resigned from his job the jury may have guessed that the petitioner may have quessed that the indictment was pending. The Court does refer in passing to other circumstances that may have been considered. However, upon examination,

they cannot be pointed to as evidence that the petitoner know that the indictement was pending. For example, the Court states that there was an "absence of any (other) discernible reason for acting in such a precipitate manner". App. A. p. 23. This is not an accurate statment of the evidence before the jury as the petitioner did introduce evidence through the testimony of a friend and colleague that could have been such a reason. The discounting of this as a discernible reasons indicates that the Court has gone beyond its proper bounds and has made a determination of what evidence the jury would believe or find credible. The Court makes it clear that the circumstance of the timing and nature of the 1980 indictment is the centerpiece of the motive hypothesis. App. A. p. 24.

The Circuit Court then goes on to remark on the "ironic overtones of the

scenario". App. A. p. 20, seeming to state that because evidence that might have shown that the petioner had advance knowlege of the possibilty of an indictment was excluded at his request, he cannot now complain that the evidence of the indictment was not excluded. As ironic as this might seem to some, it is totally irrelevant as to the question of whether the indictment should have been admitted. The relevance of any piece of evidence can only be determined in the context of what has been or will be admitted and not based on what has been excluded. The critical question is whether the evidence has a tendency to allow the jury to find any material fact more probable or not. This can only be determined in light of what goes to the jury and not in light of what the judge may have heard. The Court's reference to the "irony", accusation that the "criminal petitioner" was trying to play a shell

game with the court, implication that the petitioner was attempting to make an "ass" of the law, statment that "having one's cake and eating it too, is not the fashion in this circuit", App. A. P. 20-21, and intemperate language throughout the opinion are indications that the Court itself was relying on excluded evidence to make a determination of relevance. To allow a Court to do so deprives a petitioner of his right to trial by jury.

Without anything to show the petitioner had prior knowledge of or reason to suspect the likelihood of the 1980 indictment, that indictment cannot make more probable the inference that the petitioner resigned because of the indictment. It is a far and unsupported leap from the fact that a person is indicted one day after a resignation to the inference that the person knew or suspected that the secret indictment was

coming and in fact resigned because of it. Without any evidence of previous knowledge or suspicion no inferences can be drawn from the 1980 indictment concerning events which took place prior to its return. The evidence of the indictment is thus irrelevant and inadmissible under Rule 402. The total lack of such evidence makes this determination not one subject to the "discretion" of the trial judge. Nothing makes the evidence of the indictment relevant and no weighing process is necessary.

Needless to say, the introduction of the 1980 indictment caused great harm to the petitioner. The admission of any evidence of a prior crime is a serious question. "Because of the potential for prejudice, the trial judge should act with extreme caution, and any doubt as to the admissibility of the other crime should be resolved in favor of the petitioner and against admissibility." C. Torcia,

Wharton's Criminal Evidence, section 241 (13th ed. 1972) and cases cited therein.

This is a recognition of the substantial harm done to the legal system when such evidence is introduced since there is a serious risk that the jury will use such evidence improperly, determining the outcome of the case on the propensity to commit a crime or the "bad nature" of the petitioner. This was particularly true in the instant case where the judge actually instructed the jury that the petitioner was indicted in the past for misconduct in office. In a case concerning a fraud related to that same office, this is tantamount to saying that the petitioner has a tendency to misuse his public employment. The admission of such irrelevant evidence must be considered error.

The argument was made at trial by the government that the 1980 indictment could

be admitted under Rule 404 as evidence of other crimes, wrongs or acts. This argument was not reached by the Court of Appeals, App. A. p. 26, but as it may have been a factor in the District Court, petitioner will briefly address the point.

The government argued that the 1980 indictment was "inextricably entwined" with the instant offense and was part of the "story of the crime on trial." In addition, the government argued that the 1980 indictment shows the motive for the petitioner's resignation and his intent to defraud. This entire line of argument, however, fails because the government is unable to point to one admissible piece of evidence to show that the petitioner had any knowledge that he was going to be indicted. Without such evidence, it is impossible for the jury to infer that the October 16, 1980 indictment had any bearing on the October 15, 1980 resignation.

It must also be noted that Rule 404 refers to evidence of other crimes, wrongs or acts. The 1980 indictment is not evidence of a crime or even of a wrong or act committed by the petitioner. Indictments are not evidence of guilt or wrongdoing by a petitioner. Poretto v. United States, 196 F.2d 392 (9th Cir. 1952); Marcone v. Penthouse Intern., Ltd., 577 F.Supp. 318 (E.D. Penn. 1983); Unitd States v. Foster, 9 F.R.D. 367 (S.D.N.Y. 1949).

Finally, as noted above, any evidence of former crimes should be admitted only with extreme caution with all doubts being resolved against admissibility. DeVore v. United States, 368 F.2d 396 (9th Cir., 1966).

As Judge Skelly Wright observed in Pinkney v. United States:

> This court has recognized that evidence of prior convictions must be received with caution for such evidence 'not

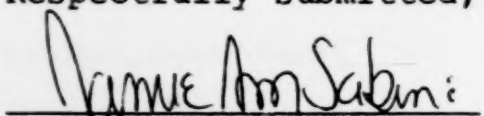
> only permits the prosecutor to throw doubt upon the defendant's testimony regarding the facts of the case being tried, but also may result in casting such an atmosphere of aspersion and disrepute about the defendant as to convince the jury that he is an habitual lawbreaker who should be punished and confined for the general good of the community.'

363 F.2d 696, 698 (D.C.Cir. 1966)

CONCLUSION

Based on the foregoing, the writ of certiorari should issue to review the decision of the Court of Appeals for the First Circuit.

Respectfully submitted,



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APPENDIX A

Selya, District Judge.

Appellant, Robert F. Tierney, appeals his conviction in the United States District Court for the District of Massachusetts upon an indictment charging him with eighteen counts of mail fraud in violation of 18 U.S.C. §1341. The core element of the indictment was the thesis that Tierney, formerly a supervisor of attendance for the school department of the City of Boston, knowingly and willfully devised and implemented a scheme to defraud the State/Boston Retirement System (SBRS) of pension benefits, whilst repeatedly using the mails in furtherance of his artifice. (Tierney, as a municipal employee, was eligible to partake of the benefices of the SBRS.) The affairs of the SBRS were at the time administered in pertinent part by a Retirement Board (Board).

Tierney was indicted by a federal grand jury on February 15, 1984 and arraigned on February 23. After a six day trial, a jury returned guilty verdicts on all counts on May 24, 1984. He was subsequently sentenced and seasonably prosecuted this appeal.

Appellant raises but two issues for our consideration. He urges, first, that the evidence was insufficient to support the government's case against him. The second string to his bow is that the district judge committed prejudicial error in admitting evidence of, and references to, an earlier indictment lodged against him. We find both contentions bootless.

I.

Tierney's broader proffer need not long detain us (though it necessarily occupies some substantial time to set out the relevant facts). The asseveration questions whether there was enough evidence to support a jury finding that

the appellant was guilty. The proper yardstick to be applied when the evidence is largely circumstantial is "whether the total evidence, including reasonable inferences, when put together is sufficient to warrant a jury to conclude that the defendant is guilty beyond a reasonable doubt." Dirring v. United States, 328 F.2d 512, 515 (1st Cir. 1964). See also United States v. Drougas, 748 F.2d 8, 15 (1st Cir. 1984); United States v. Mehtala, 578 F.2d 6, 10 (1st Cir. 1978); United States v. Francomano, 554 F.2d 483, 486 (1st Cir. 1977). See generally Holland v. United States, 348 U.S. 121, 139-40 (1954). In conducting this measurement, we consider the evidence in its totality, taken in the light most flattering to the government, together with all legitimate inferences to be drawn thereform, in an effort to ascertain whether a rational trier of the

facts could have found the appellant guilty beyond any reasonable doubt. Drougas, 748 F.2d at 15, United States v. Smith, 680 F.2d 255, 259 (1st Cir. 1982), cert. denied, 103 S. Ct. 738 (1983); United States v. Patterson, 644 F.2d 890, 893 (1st Cir. 1981).

We cannot say that the evidence in this case, so viewed, was inadeqate to support the verdicts. To the contrary, after a careful examination of the record, we find the government's proof to be compelling. A decurtate summary, drawn, as required, from the prosecution's vantage point, suffers to make the point beyond cavil.

The saga began with a minor vehicular accident which occurred on November 25, 1975, ostensibly while the appellant was on a work-related mission. Tierney, despite the absence of apparent physical injury or visible damage to either of the cars involved, pressed a bodily injury

claim. He had sustained (so he said) cervical and lumbo-sacral damage. He stayed out of work (on sick leave) until the following May. He toiled without incident for the remainder of 1976 and thereafter. Several physicians examined him in 1976 and 1977 in connection with, inter alia, his worker's compensation claim against the city and his third-party tort suit against the adverse operator. There was plethoric evidence that he had, by 1977, fully recovered from whatever neck and back injuries he might have sustained in the November, 1975 accident. Indeed, Tierney himself testified in a deposition taken on July 20, 1977 that he had no lingering sequellae.

The record further reflects that the appellant's employment record was, from mid-1976 foward, admirable. He lost virtually no time from work due to illness of any kind. By way of illustration, he

took not a single "sick day" from September 1, 1979 to October 15, 1980. And, during these years, the industrious Mr. Tierney moonlighted in a regular second (evening) job and toiled summers as a gardener (a non-sedentary position which required heavy labor).

On October 15, 1980, without any prior notice to his superiors, the appellant resigned, effective forthwith. That very afternoon, he requested an application for superannuation retirement from SBRS.[1] The Board computed his maximum superannuation benefits and notified him in early December that he would be entitled to receive an annual pension of $10,515. At that point, Tierney seemingly lost interest in exploring this avenue; instead, in July of 1981, he applied to SBRS for an accidental disability retirement pension (ADRP). Such a stipend promised to be considerably more munificent than a superannuation

arrangement; ADRP benefits are calculated equal to 72% of the applicant's salary at (i) the time of injury, or (ii) the last year of covered employment, whichever is greater. See M.G.L. c. 32 §7(2)(a)(ii). There was, however, a catch: an ADRP is available only to one who is totally and permanently disabled, by reason of a work-related injury, from performing his duties. See id.

Tierney posited his ADRP application upon the November 25, 1975 automobile accident. He claimed, in substance, that he had been compelled to quit his job because of severe low-back pain which had plagued him since that occurrence. Various documents which he submitted to the Board in the course of the ensuing proceedings were sent through the mails; these mailings, collectively, form the predicate for the multiple counts of mail fraud set out in the instant indictment.

Tierney went through the wonted medical review process and testified at a hearing before the Board on December 8, 1981. The Board hearing was tape recorded, and relevant portions of the tape were admitted into evidence at the trial in the court below. The Board ceded an ADRP to the appellant in January, 1982, granting him a lifetime annuity of $19,060 yearly.

Though more will be said on the point hereafter, see text post at Part II, it should also be mentioned at this juncture that on October 16, 1980, the day after the appellant so abruptly resigned from his lifelong employment, he was indicted by a federal grand jury for Hobbs Act violations (18 U.S.C. §§1951, 1952) involving an alleged extortion attempt carried out in the course of the school department's business (the 1980 Indictment). Inasmuch as the attempted extortion wan an offense cognizable under M.G.L. c. 268A §25,[2] the bringing of the

indictment would have jeopardized any claim by Tierney for retirement benefits of any sort had he not resigned the day before.

We need not burrow into the minutiae of the appellant's deceit. The record of his dealings with the SBRS is honeycombed with evidence of statments, claims, declarations, and assertions by Tierney which, if the jurors believed the government's proof at the trial (as indeed they did), could be viewed only as palpably and designedly false and fraudulent. We call attention to but a few of the strands in an encompassing fabric of Tierney's complicity:

1. His overblown description of the November, 1975 mishap as a "large trauma" and his claim of loss of consciousness and other dread afflictions were belied by the great weight of the credible evidence offered at trial.

2. His jeremiad anent his "gradually increasing low-back pain" and his lament to the Board that his supposed injuries had caused him "continued difficulty" since 1975 were completely undermined not only by the believable medical evidence, but by Tierney's near-perfect work record, his deposition testimony in the civil suit, the absence of any bills for medical treatment between 1976 and 1981,[3] the testimony of coworkers, and his ability both to hold down a second job and to perform operose tasks of his chosen summertime vocation.

3. The delay in applying for an ADRP, and the intervening exploration of superannuation benefits, were themselves probative. If Tierney had been genuinely disabled, the superannuation pavane would have been entirely unnecessary. No innocent explanation for this delay (or for the ensuing change in signals) satisfactorily appears of record.

4. After the appellant resigned from his school department post, he worked for several weeks in a more demanding occupation, i.e., at an automobile maintenance and repair area. That job involved, inter alia, the changing of truck tires. His work was good in all respects.

5. Last--but surely not least--Tierney, shortly before he filed the July, 1981 ADRP petition, applied privately for the issuance of life insurance. He advised the prospective insurer in April of 1981 that he had no "current medical problems which...required immediate medical treatment;"[4] that his health was "good;" that he was not taking any medication; and that he had never been "unable to hold a job" because of "inability to perform certain motions," "inability to assume certain positions," or for "other medical reasons." And, a

doctor's examination performed contemporaneously with the insurance application confirmed his ability to do physical work without any special limitations. All of this, of course, ran directly athwart Tierney's litany of protests to the Board and his repetitive claim that he was totally and permanently disabled as of October 15, 1980 and thereafter.

This list could go on and on, but no useful purpose would be served. Viewed dispassionately, the cold record shows a man who was under no significant disability; who, desginedly and with malice aforethought, made sentiently false representations to the Board and to its screening panel of physicians in order to euchre an inflated pension benefit from SBRS (which he knew he did not deserve); and who, with intent to deceive, purposefully utilized the United States mails in an effort to accomplish his

nefarious ends. Tierney's overriding compulsion was less the pain in his back than the larceny in his heart. The verdicts were in every respect supported by substantial--indeed, overwhelming--record of evidence. The sufficiency challenge is jejune.

II.

The appellant also questions the admission of evidence relating to the 1980 Indictment. Consideration of this point requires some further explication of the proceedings below.

In the course of pretrial discovery, the government indicated, early on, that it intended to offer proof in its case in chief not only of the 1980 Indictment, but of the appellant's ensuing conviction thereon. This tactic came as no suprise: the indictment in the instant case (paragraph 7) specifically referenced to the 1980 Indictment. And, the 1980

Indictment had been prominently mentioned at the Board hearing.

Both before and during the trial, the appellant's counsel sought to strike, exclude, and/or restrict the government's evidence in this regard. The district judge addressed the issue on at least four separate occasions; he undertook an exhaustive evaluation of the proffer and of its ramifications, displayed commendable sensitivity to the rights of the accused, and fully explored the entire subject matter. The district judge resolved the dilemna in Solomnic fashion: he refused to permit the government to show that Tierney was keenly aware, in early October of 1980, of his imminent jeopardy,[5] or to show his ensuing conviction,[6] sentencing and consequent incarceration.[7] in it case in chief, he allowed the government of show the fact and timing of the 1980 indictment, and allowed certain (minimal) references to it to remain in the Board

record; and he established draconian restrictions upon the use of the evidence so admitted, especially in final argument. (Appellant concedes that these guidelines were observed to the letter.) Finally, the district court gave proper limiting instructions to the jury, both contemporaneous with the admission of what remained of the disputed evidence and in the charge.

The appellant argues before us that even the abridged evidence of the 1980 Indictment was inadmissible as irrelevant; and further, that if relevant, its probative value was so far outweighed by its unfairly prejudicial effect that it should ahve been excluded. Neither argument carries the day.

We have consistently recognized, and we affirm today, that the district courts have broad discretion as to discerning the relevancy vel non of evidence, and as to

gauging the probative value versus prejudicial impact calculus. E.g., United States v. Marler, No. 84-1272, slip op. at 26-27 (1st Cir. March 8, 1985); United States v. Strahl, 590 F.2d 10, 12 (1st Cir. 1978), cert. denied, 440 U.S. 918 (1979); United States v. DeVincent, 546 F.2d 452, 456-57 (1st Cir. 1976), cert. denied, 431 U.S. 903 (1977). Under Fed. R. Evid. 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Where, as here, the disputed evidence is offered to show motive, the relevancy hurdle is at its nadir. Motive is, by definition, subjective in nature; it is a state of mind that is shown by proving the emotion that brings it into being. Thus, as to such testimony, Professor Wigmore has observed that:

> [A] circumstance showing the probability of appropriate ensuing action... is always relevant... .

1 Wigmore on Evidence §118 at 558 (3d ed. 1940). As to such proof, relevancy objections have long been disfavored. E.g. Moore v. United States, 150 U.S. 57, 60-61 (1893). And, in recognition of these pragmatic truths, the better-reasoned view has come to be that

> [I]n general, any fact may be offered which by possibility can be conceived as tending with others towards the emotion in question.

United States v. Day, 591 F.2d 861, 874-75 (D.C. Cir. 1978) (quoting 2 Wigmore, op. cit. supra, §389 at 329) (emphasis original).

Courts ought not to function in an artificially sterile environment. Certainly, a reasonable man might well have his assessment of Tierney's motive for resigning altered perceptibly by the knowledge that, a day later, he was named

in an indictment which, had he remained in the city's service, would have put all his pension rights at risk. The district court did not err in judging this piece of proof to be relevant within the meaning of Fed. R. Evid. 401.

A closer question is presented by the plea that the worth of the proffered tidbit was too far outstripped by its (unfairly) harmful effects. Tierney maintains that, even if the challenged proof was relevant under 401, it nevertheless failed to pass muster under the balancing test constructed by Fed. R. Evid. 403 ("Although relevant, evidence may be excluded if its probabtive value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...."). Yet here again, it must be remembered that the trial judge is Johnny-on-the-spot; he has savored the full taste of the fray, and his considerable discretion must be

respected so long as he does not stray entirely beyond the pale. Marler, supra; Strahl, supra; United States v. Williams, 545 F.2d 47, 50 (8th Cir. 1976) (per curiam).

Refined to its barest essence, the appellant's argument on this point is that, on one hand, the jury's knowledge of the 1980 Indictment proved very little. After all, there was no direct evidence that Tierney knew the indictment was forthcoming; and grand jury proceedings are, by their very nature, cloaked in secrecy. E.g., Fed. R. Crim. P. 6(e). If and to the extent that Tierney was ignorant of the indictment, it could have formed no part of his motive. On the second hand, the appellant's theorem runs, the jury's awareness that he had been accused of attempted extortion was, despite the cautionary instructions, despite the talesman's lack of knowledge

of conviction which ensued, unfairly prejudicial to him in the trial of this cause.

The argument is, however, flawed. First, we note that the force of the government's point relates not to Tierney's advance knowledge of the 1980 Indictment per se, but to whether or not he had reason to know that an indictment was lurking in the wings. The difference, we think, is not without significance.

Second, we must remark the ironic overtones of the scenario. The government was fully prepared to prove that Tierney had every reason to believe that he was on the brink of being indicted; this evidence was excluded, at the appellant's behest, because of what he asserted was its overly prejudicial nature. Now, he seeks to turn the tables. He says that, absent the proof which he asked (successfully) to be withheld, the remaining evidence is undercut. We doubt that the law is such an

ass as to permit a criminal defendant rewardingly to play a shell game of this sort with the trial judge. Having one's cake and eating it, too, is not the fashion in this circuit. Cf. United States v. Ven-Fuel, Inc., No. 84-1268, slip op. at 54 & n. 17 (1st Cir. March 21, 1985). But, we need not dwell on this strange turn of event; Tierney's fizgig can be defused on more mundane grounds.

Juries have long been allowed -- indeed, encouraged -- to draw inferences from the evidence. Judge Torruella, writing for a unanimous panel of this court, has defined the quintessential nature of such illations:

> Inference is the process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted.

Computer Identics Corp. v. Southern Pacific Co., No. 84-1277, slip op. at 11

(1st Cir. March 7, 1985).

Our cases have acknowledged that assumptions into which no life could be breathed in an intellectual vacuum may well take on vitality when viewed in the vibrant context of an array of zoetic events. E.g., Drougas, 748 F.2d at 25 (assumption that a telephone call placed to a business establishment was intended for a particular recipient when the identities of neither the caller or the receiver were known); United States v. Fortes, 619 F.2d 122 (1st Cir. 1980) (paper fragments, though not identifiable as being tied to a given source, admissible to support an inference as to defendant's access to proceeds of a particular bank robbery).

These principles govern in the case at bar. Even in the absence of direct evidence of Tierney's foreknowledge of the 1980 Indictment, the jury, armed with the totality of the circumstances, e.g., the suddenness of his resignation, the lack of customary notice to his employer, the absence of any (other) discernible reason for acting in such a precipitate manner, the peculiar hemming and hawing which followed anent the superannuation pension, the provisions and effect of M.G.L. c. 268, §25, could permissibly have reasoned that the proposition which the government sought to establish (that the appellant, driven by a desire to salvage his pension, set in motion the entire iniquitous scheme because of his forebodings about the imminence of indictment on the extortion scam) was deducible as a logical consquence of the complete panoply of facts proven or admitted (including as

perhaps the centerpiece of the motive hypothesis, the nature and timing of the 1980 Indictment). See, e.g., Freeman v. Decio, 584 F.2d 186, 197, n. 44 (7th Cir. 1978) (when it is shown that an insider made a sudden sale of his corporation's stock and that, immediately thereafter, material adverse information about the company's prospects became public knowledge, an inference arises that the insider was bailing out); Wigmore, supra, §154 at 601 (sudden possession of money, coincident with timing of events, makes dishonest acquisition a "natural and prominent hypothesis"); see also United States v. Tramunti, 513 F.2d 1087, 1105 (2nd Cir. 1975) (possession of large amounts of unexplained cash can, with other evidnce, give rise to inference of narcotics trafficking); United States v. Loften, 518 F. Supp. 839, 843-44 (S.D.N.Y. 1981) (to like effect).

In sum, the handing up of the 1980

Indictment and the chronometry of the surrounding events had positive probative force in the idiocratic circumstances of this case. That being so, and the district court having exhibited accipitrine vigilance in the premises and having wisely undertaken a myriad of prophylactic measures to counteract any unfair prejudice associated with the introduction of the evidence, see text ante, we decline the appellant's invitation to second-guess the trial judge's calibration of the Fed. R. Evid. 403 scales. There was no abuse of discretion.

The appellant's belated claim that the jury was necessarily "confused" as between the present indictment and the 1980 Indictment, if not waived by Tierney's failure to object to the introduction of the evidence on this ground (despite four different opportunities to do so), cf.

Bryant v. Consolidated Rail Corp., 672 F.2d 217, 220 & n. 4 (1st Cir. 1982) is without merit. The district court's charge, taken as a whole, clearly differentiated between the two and eliminated any reasonable possibility of harmful confusion. And, since the appellant made no contemporaneous complaint that the instructions in this regard were confusing (to the contrary, his trial counsel virtually invited the instruction as given), it is too late to consider any claim of error in this wise. See Fed. R. Civ. P. 30. See also McGrath v. Spirito, 733 F.2d 967, 968-69 (1st Cir. 1984). In view of our determination that the disputed evidence was properly admitted under Fed. R. Evid. 403, it would be superogatory for us to discuss the parties' conflicting claims vis-a-vis the admissibilty of the same under Fed. R. Evid. 404(b). And, for the identic reason, we eschew consideration of

the government's exhortation that the admission of the evidence in its limited and sanitzed form, was, if error at all, harmless, in that it was highly probable, given the convictive might of the prosecution case, that guilty verdicts would in any event have ensued. E.g., Fortes, 619 F.2d at 122; United States v. Bosch, 584 F.2d 1113, 1117-18 (1st Cir. 1978).

III.

It appears to us, without serious question, that Tierney was fairly tried and fairly convicted, and we so hold. His assignments of error are uniformly meritless.

Affirmed.

FOOTNOTES

1. See generally M.G.L. c. 32, §5. Because Tierney, though he had upwards of twenty years of covered service, was under the age of fifty-five, early retirement was in his case controlled by the strictures of M.G.L. c. 32 §10.

2. M.G.L. c. 268A, §25 provides in pertinent part as follows:

An officer or employee of a county, city, town or district, howsoever formed, including but not limited to, regional planning districts, or of any department, board, commission or agency thereof may, during any period such officer or employee is under indictment for misconduct in such office or employment or for misconduct in any elective or appointive public office, trust or employment at any time held by him, be suspended by the appointing authority, whether or not such appointment was subject to approval in any manner.

Any person so suspended shall not receive any compensation or salary during the period of suspension, nor shall the period of his suspension be counted in computing his sick leave or vacation benefits or seniority rights, nor shall any person who retires from service while under such suspension be entitled to any pension or retirement benefits, notwithstanding any contrary provisions of law, but all contributions paid by him into a retirement fund, if any, shall be returned to him.

The district court ruled, as a matter of law, that the allegations contained in the 1980 Indictment were sufficient to trigger the palliatives of this statute. That ruling has not been contested on

appeal.

3. Appropriate insurance records offered at the trial likewise confirmed the absence of medical care during this span.

4. The appellant did, in response to this inquiry, add as an eschatocol to his negative answer: "? hypertension".

5. The government offered to prove that, following the much-publicized arrests of a Boston school committeeman (Gerald O'Leary) and of a local atorney (Richard Mulhern) implicated in the extortion scheme, FBI agents visited Tierney on October 6, 1980. Once Tierney became aware of their interest in the extortion case, he referred them to his counsel. A follow-up meeting was held a few days later. The agents sought Tierney's cooperation, and warned him, in substance, that an indictment was th likely alternative. Specific allusion was made to the Assistant United States Attorney "handling [Tierney's] case." The conversations were not offered for the truth of the matters asserted, but merely to show that the appellant was on such notice. And, Tierney was present. Thus, there was no hearsay barrier.

This evidence, which would have clearly demonstrated the basis for Tierney's presentiment of a forthcoming indictment, was apprently excluded by the district judge because of its tendency to link the appellant with O'Leary and Mulhern (each of whom had attained some local notoriety) and because of the highly suggestive contents of the comments of the FBI agents. Though we applaud the district court's motives in striving to eradicate perceived prejudice, we note (albeit do

not decide) that a redacted version of those conversations was quite probably admissible in evidence. If so admitted, many of Tierney's present posturings would not be possible.

6. Had Tierney testified in his own defense, the government could have presumably used the conviction in corss-examination. See Fed. R. Evid. 609(a)(2).

7. The evidence anent incarceration related to medical histories given by, and physical examinations of, the accused when imprisoned at Eglin Federal Prison Camp following his conviction on the 1980 Indictment. Such evidence was, given the breadth of the other available proof, plainly cumulative.

8. In light of our appraisal of the situation, we need not pursue further the notion that, after October 16, 1980, the pendency of the 1980 Indictment itself constituted a likely influence on Tierney's decision to eschew the superannuation pension and go for broke by pressing his ill-advised (and spurious) ADRP claim. We do not mean, however, to minimize the force of such an argument; after all, it was not until the appellant knew for certain that he had been indicted (and that, therefore, his retirement bridge had been burned behind him) that he irrevocably committed himself to the perilous course which involved the commission of the very crimes for which he here stands convicted.

9. We observe, in passing, that this was not a case where the government, equipped with a boxful of routinely admissible evidentiary nails, reached out to the periphery to grasp a particularly

inflammatory spike in an effort to drive one fastening too many into the defendant's coffin. We deplore what we perceive to be a trend towards the use of such prosecutorial overkill, ad we will hold excesses in check wheresoever they appear. But here, the government's analysis of the appellant's motive was a commonsense one, and it could best be proven in precisely the manner essayed at trial.